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**DEPARTMENT OF JUSTICE**

**28 CFR Part 16**

**[CPCLO Order No. 011-2017]**

**Privacy Act of 1974; Implementation**

**AGENCY:** Federal Bureau of Investigation, United States Department of Justice.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** In the Notice section of today's Federal Register, the Federal Bureau of Investigation (FBI), a component of the Department of Justice (Department or DOJ), has published a notice of a new Privacy Act system of records, "FBI Online Collaboration Systems," JUSTICE/FBI-004. In this notice of proposed rulemaking, the FBI proposes to exempt this system of records from certain provisions of the Privacy Act in order to prevent interference with the national security and criminal law enforcement functions and responsibilities of the FBI and its partners. For the reasons provided below, the Department proposes to amend its Privacy Act regulations by establishing an exemption for records in this system from certain provisions of the Privacy Act. Public comment is invited.

**DATES:** Comments must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may send comments by any of the following methods:

- E-mail: *privacy.compliance@usdoj.gov*. To ensure proper handling, please reference the CPCLO Order No. in the subject line of the message.
- Fax: 202-307-0693. To ensure proper handling, please reference the CPCLO Order No. on the cover page of the fax.
- Mail: United States Department of Justice, Office of Privacy and Civil Liberties, ATTN: Privacy Analyst, National Place Building, 1331 Pennsylvania Avenue, NW., Suite 1000, Washington, DC 20530. All comments sent via regular or express mail will be considered timely if postmarked on the day the comment period closes. To ensure proper handling, please reference the CPCLO Order No. in your correspondence.
- Federal eRulemaking Portal: *http://www.regulations.gov*. When submitting comments electronically, you must include the CPCLO Order No. in the subject box. Please note that the Department is requesting that electronic comments be submitted before midnight Eastern Daylight Savings Time on the day the comment period closes because *http://www.regulations.gov* terminates the public's ability to submit comments at that time. Commenters in time zones other than Eastern Time may want to consider this so that their electronic comments are received.

*Posting of Public Comments:* Please note that all comments received are considered part of the public record and made available for public inspection online at *http://www.regulations.gov* and in the Department's public docket. Such information includes personally identifying information (such as your name, address, etc.) voluntarily submitted by the commenter. If you want to submit personal identifying information

(such as your name, address, etc.) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase **PERSONALLY IDENTIFYING INFORMATION** in the first paragraph of your comment. You must also place all personal identifying information that you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase **CONFIDENTIAL BUSINESS INFORMATION** in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personally identifying information and confidential business information identified and located as set forth above will be redacted and the comment, in redacted form, may be posted online and placed in the Department's public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph, below.

**FOR FURTHER INFORMATION CONTACT:** Katherine M. Bond, Assistant General Counsel, Privacy and Civil Liberties Unit, Office of the General Counsel, FBI, 935 Pennsylvania Avenue, NW., Washington, DC 20535-0001, telephone 202-324-3000.

**SUPPLEMENTARY INFORMATION:**

## **FBI Online Collaboration Systems**

In the Notice section of today's Federal Register, the FBI has established a new Privacy Act system of records, "FBI Online Collaboration Systems," JUSTICE/FBI-004. The FBI's Online Collaboration Systems will promote communication and information sharing for federal, state, local, tribal, territorial, foreign, and international criminal justice agencies, emergency management personnel and first responders, and private sector partners as well as military and other government personnel involved in law enforcement and national security matters, by allowing the FBI and its partners to communicate with experts, create and join communities of common interest, create blogs to present ideas and receive feedback, share files with colleagues, exchange ideas through online forums, enhance situational awareness, and facilitate incident management. By providing online communication platforms such as JusticeConnect, collaboration tools such as Special Interest Groups and Virtual Command Centers, and providing and maintaining a secure communications network, the FBI will increase collaboration and cooperation between and among its partners. In this rulemaking, the FBI proposes to exempt this Privacy Act system of records from certain provisions of the Privacy Act in order to prevent interference with the responsibilities of the FBI and its partners to detect, deter, and prosecute crimes and to protect the national security.

## **Regulatory Flexibility Act**

This proposed rule relates to individuals rather than small business entities. Pursuant to the requirements of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, therefore, the proposed rule will not have a significant economic impact on a substantial number of small entities.

**Small Business Regulatory Enforcement Fairness Act of 1996 (Subtitle E–  
Congressional Review Act)**

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, 5 U.S.C. 801 *et seq.*, requires the FBI to comply with small entity requests for information and advice about compliance with statutes and regulations within FBI jurisdiction. Any small entity that has a question regarding this document may contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph, above. Persons can obtain further information regarding SBREFA on the Small Business Administration’s Web page at [http://www.sba.gov/advo/archive/sum\\_sbrefa.html](http://www.sba.gov/advo/archive/sum_sbrefa.html).

**Paperwork Reduction Act**

The Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), requires that the FBI consider the impact of paperwork and other information collection burdens imposed on the public. There are no current or new information collection requirements associated with this proposed rule. The records that are contributed to this system are created by the FBI or other law enforcement and governmental entities. Sharing of this information electronically will not increase the paperwork burden on the public.

**Analysis of Regulatory Impacts**

This proposed rule is not a “significant regulatory action” within the meaning of Executive Order 12866 and therefore further regulatory evaluation is not necessary. This proposed rule will not have a significant economic impact on a substantial number of small entities because it applies only to information about individuals.

**Unfunded Mandates Reform Act of 1995**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 103-3, 109 Stat. 48, requires Federal agencies to assess the effects of certain regulatory actions on State, local, and tribal governments, and the private sector. UMRA requires a written statement of economic and regulatory alternatives for proposed and final rules that contain Federal mandates. A “Federal mandate” is a new or additional enforceable duty, imposed on any State, local, or tribal government, or the private sector. If any Federal mandate causes those entities to spend, in aggregate, \$100 million or more in any one year, the UMRA analysis is required. This proposed rule would not impose Federal mandates on any State, local, or tribal government or the private sector.

#### **List of Subjects in 28 CFR Part 16**

Administrative practice and procedure, Courts, Freedom of information, Privacy.

Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a and delegated to me by Attorney General Order 2940-2008, 28 CFR part 16 is proposed to be amended as follows:

#### **PART 16- PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION**

1. The authority citation for part 16 continues to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a, 553; 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717.

#### **Subpart E – Exemption of Records Systems Under the Privacy Act**

2. Amend § 16.96 by adding paragraphs (x) and (y) to read as follows:

**§ 16.96 Exemption of Federal Bureau of Investigation Systems-limited access.**

\* \* \* \* \*

(x) The Federal Bureau of Investigation Online Collaboration Systems (JUSTICE/FBI-004) system of records is exempted from subsections 5 U.S.C. 552a(c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1), (2), (3), (4)(G), (H), and (I), (5), and (8); (f); and (g) of the Privacy Act:

(1) FBI Online Collaboration Systems, (JUSTICE/FBI-004).

(2) These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j) or (k). Where the FBI determines compliance with an exempted provision would not appear to interfere with or adversely affect interests of the United States or other system stakeholders, the FBI in its sole discretion may waive an exemption in whole or in part; exercise of this discretionary waiver prerogative in a particular matter shall not create any entitlement to or expectation of waiver in that matter or any other matter. As a condition of discretionary waiver, the FBI in its sole discretion may impose any restrictions deemed advisable by the FBI (including, but not limited to, restrictions on the location, manner, or scope of notice, access or amendment).

(y) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3), the requirement that an accounting be made available to the named subject of a record, because this system is exempt from the access provisions of subsection (d). Also, because making available to a record subject the

accounting of disclosures from records concerning him/her would specifically reveal any law enforcement or national security investigative interest in the individual by the FBI or agencies that are recipients of the disclosures. Revealing this information could compromise ongoing, authorized law enforcement and intelligence efforts, particularly efforts to identify and defuse any potential acts of terrorism or other potential violations of criminal law. Revealing this information could also permit the record subject to obtain valuable insight concerning the information obtained during any investigation and to take measures to circumvent the investigation (e.g., destroy evidence or flee the area to avoid investigation).

(2) From subsection (c)(4) notification requirements because this system is exempt from the access and amendment provisions of subsection (d) as well as the accounting disclosures provision of subsection (c)(3). The FBI takes seriously its obligation to maintain accurate records despite its assertion of this exemption, and to the extent it, in its sole discretion, agrees to permit amendment or correction of FBI records, it will share that information in appropriate cases.

(3) From subsection (d)(1), (2), (3), and (4), (e)(4)(G) and (H), (e)(8), (f) and (g) because these provisions concern individual access to and amendment of law enforcement and intelligence records and compliance could alert the subject of an authorized law enforcement or intelligence activity about that particular activity and the investigative interest of the FBI and/or other law enforcement or intelligence agencies. Providing access could compromise sensitive law enforcement information, disclose information that could constitute an unwarranted invasion of another's personal privacy; reveal a sensitive investigative or intelligence technique; provide information that would



allow a subject to avoid detection or apprehension; or constitute a potential danger to the health or safety of law enforcement personnel, confidential sources, and witnesses. The FBI takes seriously its obligation to maintain accurate records despite its assertion of this exemption, and to the extent it, in its sole discretion, agrees to permit amendment or correction of FBI records, it will share that information in appropriate cases with subjects of the information.

(4) From subsection (e)(1) because it is not always possible to know in advance what information is relevant and necessary for law enforcement and intelligence purposes. Relevance and necessity are questions of judgment and timing. For example, what appears relevant and necessary when collected ultimately may be deemed unnecessary. It is only after information is assessed that its relevancy and necessity in a specific investigative activity can be established.

(5) From subsections (e)(2) and (3) because application of these provisions requiring collection directly from the subject individuals and informing individuals regarding information to be collected about them, could present a serious impediment to efforts to solve crimes and improve national security. Application of these provisions would put the subject of an investigation on notice of that fact and allow the subject an opportunity to engage in conduct intended to impede that activity or avoid apprehension.

(6) From subsection (e)(4)(I), to the extent that this subsection is interpreted to require more detail regarding the record sources in this system than has already been published in the Federal Register through the SORN documentation. Should the subsection be so interpreted, exemption from this provision is necessary to protect the

sources of law enforcement and intelligence information and to protect the privacy and safety of witnesses and informants and others who provide information to the FBI.

(7) From subsection (e)(5) because in the collection of information for authorized law enforcement and intelligence purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With time, additional facts, or analysis, information may acquire new significance. The restrictions imposed by subsection (e)(5) would limit the ability of trained investigators and intelligence analysts to exercise their judgment in reporting on investigations and impede the development of criminal intelligence necessary for effective law enforcement. Although the FBI has claimed this exemption, it continuously works with its federal, state, local, tribal, and international partners to maintain the accuracy of records to the greatest extent practicable. The FBI does so with established policies and practices. The criminal justice and national security communities have a strong operational interest in using up-to-date and accurate records and will foster relationships with partners to further this interest.

Dated: November 28, 2017.

Peter A. Winn

Acting Chief Privacy and Civil Liberties  
Officer

United States Department of Justice

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